80-1154

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1980

ART HAYWARD, JR., MICHAEL MCNABB and MORRIS L. BROWN,

Petitioners,

vs.

RAYMOND K. PROCUNIER, JIRO J. ENOMOTO, WALTER BRITT, ROBERT M. REES, L. H. FUDGE, C. L. SWAGERTY, D. W. SMITH and DON R. WEBER,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

When prison administrators impose a five month lockdown, consisting of 22 to 24 hour per day confinement of prisoners to their cells, with attendant restrictions upon their usual activities and routines, and when the imposition and continuation of that lockdown is conditioned by state law, rules, and practice upon the onset and continuation of a specific factual predicate, to wit: a state of emergency, does the Fourteenth Amendment to the United States Constitution require that some form of procedural due process be afforded to the prisoners affected.

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IN THE SUPREME COURT
OF THE
UNITED STATES

October Term, 1980

No.

ART HAYWARD, JR., MICHAEL McNABB
and MORRIS L. BROWN, Petitioners,

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RAYMOND K. PROCUNIER, JIRO J.
ENOMOTO, WALTER BRITT, ROBERT M.
REES, L. H. FUDGE, C. L.
SWAGERTY, D. W. SMITH and
DON R. WEBER, Respondents.

PETITION FOR WRIT OF CERTIORARI

to the United States Court of Appeals

for the Ninth Circuit

Art Hayward, Jr., Michael McNabb, Morris L. Brown, and the class which they have been certified to represent (hereinafter "the prisoners") petition for a writ of certiorari to review the opinion and judgment of the United

States Court of Appeals for the Ninth Circuit, entered in this case on October 3, 1980.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is attached hereto as Appendix A and is reported at 629 F.2d 599. The trial court order, adopting, as modified therein, the Findings of Fact and Conclusions of Law of the United States Magistrate before whom the case was tried is attached hereto as Appendix B. The Findings of Fact and Conclusions of Law of the United States Magistrate before whom the action was tried is attached hereto as Appendix C. Neither Appendix B or C has been reported.

JURISDICTION

Judgment of the United States Court of Appeals for the Ninth Circuit in this case was entered on October 3, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the

United States Constitution provides in pertinent part:

> ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

A. The 1974-75 Lockdown at San Quentin State Prison

On December 19, 1974, following several incidents of violence at San Quentin State Prison in Tamal, California, prison authorities imposed what is commonly known as a "lockdown" or "deadlock" on the prison. At the beginning of the lockdown the prisoners were confined to their cells 24 hours a day and were served sack lunches twice a day in their cells. Gradually this regimen was relaxed. Within two to three weeks following imposition of the lockdown the prisoners began receiving one hot meal per day out of their cells. Some two weeks thereafter they began to receive two hot meals per day out of their cells and it was not until June

1975, six months after the lockdown began that the normal routine of three hot meals a day was restored.

Similarly, yard exercise and showers were abrogated entirely at the outset of the lockdown but were gradually reintroduced on a restricted basis. Finally, a great many inmate privileges such as school attendance, movies, and visiting rights were either abrogated entirely or substantially curtailed. As late as May of 1975, five months after the imposition of the lockdown, prisoners were spending approximately 22 hours per day confined to their cells, making this lockdown one of the longest and most restrictive in San Quentin history.

The authority for imposing this lockdown was found in Section 4402 of the California Rules and Regulations of the Director of Corrections and the emergency disturbance control plan promulgated pursuant thereto.* Under both the plan and San Quentin's practice, lockdowns were imposed only in an

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* These rules have been promulgated pursuant to the express statutory authorization contained in California Penal Code Section 5058.

emergency situation and only for the duration of the emergency. The plan and normal practice at San Quentin called for efforts to isolate the disturbance and to ameliorate conditions to normal operations as soon as the emergency subsided.

It was undisputed below that neither prior to* during or at any time following the imposition of the lockdown and during its five month continuance was a hearing or any other systematic fact finding procedure conducted to test the necessity for continuation of this lockdown.

B. The Proceedings Below

Following the conclusion of the lockdown the prisoners initiated this action in the United States District Court for the Northern District of California, on behalf of themselves and on

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* Prisoners made no claim below that, under the circumstances of this case, procedural due process should have preceded the imposition of the emergency measures; rather prisoners contended that at some point following the imposition of the lockdown and while its extraordinary effects continued, some procedural due process protections were required.

behalf of a class consisting of all of the residents of the East Cell Block of San Quentin State Prison, wherein they were housed during relevant periods of this lockdown. The prisoners made two principal claims under 28 U.S.C. Section 1983 arising out of this lockdown: first, that their right to procedural due process pursuant to the Fourteenth Amendment to the United States Constitution had been violated, and second, that their right to be free of cruel and unusual punishment as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution had been infringed.

The action was subsequently certified as a class action pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure. The case was referred to a United States Magistrate for trial without a jury, and the trial commenced on November 7, 1977. The Magistrate entered his Findings of Fact and Conclusions of Law on February 2, 1978, denying the prisoners' claims in their entirety. The magistrate concluded that the procedural due process clause of the Fourteenth Amendment of the United

States Constitution was inapplicable to the lockdown and that no denial of the right to be free from cruel and unusual punishment had been demonstrated by the prisoners. See Appendix C hereto. By Order dated October 16, 1978 the United States District Court to whom the case was assigned approved the Magistrate's Findings of Fact and Conclusions of Law with a minor amendment and entered judgment thereon. See Appendix B hereto.

A timely appeal was filed to the United States Court of Appeal for the Ninth Circuit, and that court, by judgment dated and entered on October 3, 198 , affirmed the judgment of the United States District Court. With respect to the procedural due process claim the court held "that there is no due process right to the hearing sought by plaintiffs in this case. In so deciding we do not minimize the seriousness of a lockdown nor do we deny that administrative review of a lockdown decision might be desirable. . . . We are simply unable to say that the Constitution dictates such a procedure." See Appendix A at p. 8.

With respect to the Eighth Amend-

ment claim the court held that "these decisions [the lockdown decisions] are delicate ones and those charged with them must be given reasonable leeway. . . . The court below carefully reviewed the restrictions of the lockdown in light of the emergency at the prison and determined that they did not cross the Eighth Amendment line. We agree with that conclusion." Id. at p. 9.

REASONS FOR GRANTING THE WRIT

A. The Lower Court Misapplied Procedural Due Process Precedents As They Apply To An Important Area Of Conditions Of Prison Confinement

This case presents a question never addressed by this Court concerning an important and recurring area of prison regulation of the conditions of confinement of inmates. At the outset we emphasize the urgency of dealing with the general problem of conditions of confinement of prisoners, a concern which was underscored by the tragedy at the New Mexico State Penitentiary during 1979, and which has been forcefully

singled out for special attention by the Chief Justice of this Court in his year end report on the judiciary. See e.g., The New York Times, December 29, 1980 at p. 11.

The utilization of lockdowns or deadlocks is common in many prison systems across the United States, as is revealed by the numerous cases involving this situation in various circuits. See cases discussed in Section B infra. Thus the question presented here is of national importance and application. As noted above, the prisoners challenged the five month San Quentin 1974-1975 lockdown on two principal grounds: that it was continued without procedural due process, and that it violated plaintiffs' rights to be free of cruel and unusual punishment.

Petitioners, while disagreeing with the Court of Appeals' conclusion on the cruel and unusual punishment issue, do not believe that claim, standing alone, warrants review here, because no new and/or generally applicable standards would be derived therefrom. Accordingly, petitioners seek review only of the lower courts disposition of the pro-

cedural due process question which, we submit, both was erroneously decided below, and is of national application in an important area of conditions of prison confinement.

As indicated in the quotation above, the Court of Appeals conceded the serious and substantial nature of the deprivations incident to a five month lockdown and the desirability of some systematic review or fact finding procedure to insure their necessity. Nonetheless it concluded that such a review was not constitutionally compelled by the due process clause and that the only scrutiny to which such a lockdown should be subject is Eighth Amendment scrutiny. As developed below, in relegating scrutiny of a lockdown solely to the bases afforded by the Eighth Amendment, the Court of Appeals both departed from procedural due process precedents of this Court and enunciated a principle which is unsound from a policy viewpoint.

In rejecting the prisoners due process claim, the Ccurt of Appeals decided first, that the prisoners' expectation to be free of the deprivations

incident to a lockdown was too "emphemeral" to trigger procedural due process protection under the tests enunciated in Meachum v. Fano 427 U.S. 215 (1976) and its progency, and second, that even if such expectations were not deemed "emphemeral", no workable process could be fashioned here because the deprivations were visited upon a prison as a whole rather upon one prisoner. Neither of these contentions, we submit, is persuasive.

First, the record below established that prisoners had an expectation that, absent a state of emergency they would not be subjected to the magnitude of deprivations incident to a lockdown. As the Court of Appeals conceded, this expectation was grounded both in the rules of the California Department of Corrections and the actual California practice in imposing lockdowns. See Appendix A at p. 5. Accordingly, under the principles enunciated by this Court, that expectation even if "ephemeral" (which prisoners dispute) was entitled to some (even if limited) measure of due process protection. See Greenholtz v. Inmates of Nebraska Penal and Correc-

tional Complex, 442 U.S. 1 (1979) at 12.

With respect to the second basis for the court's due process holding, the prisoners do not dispute that the situation of a lockdown is different from other situations which affect only one prisoner, e.g., solitary confinement, loss of good time credits, etc. We submit, however, that this difference affects only the type of process which should be fashioned to deal with a lockdown situation, not the requirement that some systematic factfinding be undertaken. See, Greenholtz, supra at 12-14. In essence, the Court of Appeals' due process analysis disregards the fundamental predicate for procedural due process in the prison context: "if substantial deprivations are to be visited upon a prisoner it is wise that such action should at least be premised upon the facts rationally determined." Sostre v. McGinnis, 442 F.2d 178 at 198 (2nd Cir. 1971). As this Court has succinctly stated in Greenholtz, supra, "the function of due process as that concept is embodied in the constitution and in the realm of factfinding, is to minimize the risk of erroneous

decisions. Because of the broad spectrum of concerns to which the term must apply, flexibility is necessary to gear the process to the particular needs; the quantimum quality of process due in a particular situation depends on the need to serve the purpose of minimizing the risk of error." See Greenholtz, supra at p. 13.

The Court of Appeals decision completely ignores this flexibility. Thus the decision to lockdown a prison and to continue that lockdown, while considerably different in character from some other prison decisions affecting individual inmates only, nonetheless visits equally serious consequences upon the prisoners involved, and the need to minimize the risk of erroneous decisions is therefore equally great. Accordingly, individualized adversary hearings of the type which attend individual deprivations would clearly be inappropriate in lockdown situations. That fact, however, simply does not vitiate the need for some systematic factfinding review by a prison administrator not personally responsible for the lockdown decision, tailored to test the factual

predicate for an extended lockdown.

In addition to being unsupported by precedent, we submit that the Court of Appeals decision to relegate scrutiny of an extended lockdown solely to the Eighth Amendment is unsound on a policy basis. Thus, as the Court of Appeals observed in its Eighth Amendment analysis, those charged with "lockdown decisions must be given reasonable leeway". See Appendix A at p. 9. This is a proposition with which we do not quarrel, since prison administrators clearly possess expertise not possessed by reviewing federal courts. We submit, however, that, concomitant to the leeway accorded under the Eighth Amendment, is a procedural due process obligation upon the prison officials to insure that in exercising that leeway they are acting upon facts rationally determined. The instant lockdown, we submit, strongly supports imposition of such a procedural due process obligation. Thus, it is clear that the prison administrators who implemented and continued the lockdown for five months believed that a lockdown of that scope and duration was necessary to deal with the emergency presented at

San Quentin in 1974-75. Equally clearly the prisoners involved disagreed, believing that a lockdown of a much shorter duration and lesser scope would have sufficed, a belief supported by the testimony of a prison psychologist, to the effect that lockdowns exceeding one to two weeks in duration do not have a beneficial effect on the stability of the prison but in fact may create the very tensions which breed violence in the first instance.

Under these circumstances we submit that some systematic procedure for weighing the competing contentions, conducted by someone within the prison hierarchy other than the individual making the lockdown decisions is both reasonable and necessary. The Court of Appeals conceded that such process was desirable but concluded that it was not constitutionally mandated. In so concluding, we submit, it failed to apprehend the flexibility of procedural due process.

B. There Is A Significant Disparity Of View Point Among The Circuits On The Question Of The Applicability Of Procedural Due Process To Lockdown Situations

In addition to the importance of the question here presented to prison administration, and its erroneous disposition below, another cogent reason exists for review by this Court. At least four of the circuits, including the Ninth Circuit Court of Appeals in this case, have been presented with lockdown situations and have given quite disparate treatment to the subject. Perhaps the leading case is Labatt v. Twoomey, 513 F.2d 641 (7th Cir. 1975). The court there concluded that in a lockdown of sufficient duration, a hearing or other procedural protection must afford the prisoners either prior to, or if conditions prevent, sometime after the lockdown is initiated and while its extraordinary effects continue. The court found, however, that the nine day lockdown there involved did not implicate such procedures. Id. at 646. Similarly, the First Circuit, in Hoitt v. Vitek, 497 F.2d 598 (1st Cir. 1974),

indicated that while a lockdown of several weeks did not implicate the procedural due process protections of the Fourteenth Amendment, a lockdown of longer duration would require some due process. Id. at 600.

In its opinion the Ninth Circuit specifically rejected the reasoning of the Seventh Circuit in Labatt and impliedly rejected the reasoning of the First Circuit in Vitek. In accord with the Ninth Circuit view in this conflict is a case from the Second Circuit, Gilliard v. Oswald, 552 F.2d 456 (2d Cir. 1977), wherein the court indicated that a lockdown does not implicate the procedural due process clause. See also, Johnson v. Anderson, 370 F.Supp. 1373 (D. Delaware 1974), (where the court held that no procedural due process protections need attend the imposition of a lockdown because it was a rule change of general applicability, not one directed to particular individuals, a rationale adopted by the Ninth Circuit in this case.)

Thus, it is apparent that lockdowns are a national phenomenon, and that the question of the applicability of the procedural due process clause to them is

one to which various circuits have applied conflicting analyses. Accordingly, it is a question which should be resolved by this Court.

CONCLUSION

For the reasons set forth above, the petitioners respectfully submit that the writ of certiorari should be granted.

Dated, San Francisco, California, December 31, 1980.

Respectfully submitted,

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(Appendices Follow)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ART HAYWARD, JR., MICHAEL McNABB and MORRIS L. BROWN,

Plaintiffs/Appellants

-v-

RAYMOND K. PROCUNIER, JIRO J. ENOMOTO, WALTER BRITT, ROBERT M. REES, L. H. FUDGE, C. L. SWAGERTY, D. W. SMITH and DON R. WEBER,

Defendants/Appellees.

No. 78-3701

D.C. No. C-75-0653

O P I N I O N

Appeal from the United States District Court for the Northern District of California
William A. Ingram, District Judge, Presiding Argued and Submitted July 9, 1980

BEFORE: DUNIWAY, TANG and CANBY, Circuit Judges

CANBY, Circuit Judge

In this appeal we must decide whether state prisoners' constitutional rights to procedural due process and

freedom from cruel and unusual punishment were violated by a five-month "lockdown"[1] of the prison. The district court held that there was no constitutional violation. We agree and affirm.

FACTS:

Between 1970 and 1974 California's San Quentin Prison became an increasingly turbulent institution. The rate of violent incidents more than tripled during this period, and the influence of prison gangs steadily grew. 1974 was a particularly violent year. There were 82 assaults with weapons and 12 killings, as well as 71 cases of possession of weapons and 2 attempted escapes. Prison officials responded to the problem by temporarily "locking down" the prison several times in 1974; Department of Corrections officials even considered closing San Quentin.

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1. "Lockdown" is not a term of art. It generally refers to a condition of abnormally heightened security during which prisoners are confined to their cells totally or for a much greater portion of the day than usual. As will be seen, the restrictive incidents of the lockdown in this case changed during the period it was in effect.

Appendix A

On December 19, 1974, two men were killed in separate incidents of gang violence. Prison officials feared that the violence might spread. The warden decided that a state of emergency existed and, acting pursuant to § 4402 of the California Rules and Regulations of the Director of Corrections, he imposed a lockdown on the entire prison.

At first the prisoners were confined to their cells 24 hours a day and were served sack lunches twice a day in their cells. Gradually, however, the regimen was relaxed. Within two weeks the prisoners received one hot meal per day in the dining room. Two weeks later they received two hot meals per day and finally in June 1975, six months after the lockdown began, the normal routine of three hot meals per day was restored. Similarly, yard exercise and trips to the showers were forbidden entirely at the outset of the lockdown, but were gradually reintroduced. Showers were fully reintroduced by February 1975. Some yard exercise was permitted within a month after the lockdown began, and the normal exercise routine was restored by May. Of course a great many inmate

privileges such as movies, school attendance and visitation were partially or wholly abrogated during the five to six months of the lockdown.

The plaintiffs in this action were residents of East Block, one of the four major housing units at San Quentin, during the lockdown. They brought this action on behalf of themselves and the class of East Block residents for damages and declaratory and injunctive relief under 42 U.S.C. § 1983. They do not argue that the initial decision to impose the lockdown was necessarily improvident; indeed, the record discloses that many inmates were urging the warden to lockdown the prison after the two killings on December 19, 1974. They do, however, urge that continuance of the lockdown for more than a short time without some sort of notice and hearing at which the inmates could participate deprived them of their liberty without procedural due process, in violation of the fourteenth amendment. The prisoners also argue that the lockdown, continuing as long as it did, constituted cruel and unusual punishment in violation of the eighth and fourteenth amendments. The

district court rejected these claims and the prisoners appealed.

PROCEDURAL DUE PROCESS:

In Meachum v. Fano, 427 U.S. 215 (1976), and Montanye v. Haymes, 427 U.S. 236 (1976), the Supreme Court held that state prisoners had not lost any liberty or property interest, and hence were not entitled to procedural due process, by being transferred to a less favorable prison within the same prison system. Crucial to these decisions was the court's conclusion that the relevant state statutes, regulations and customs did not give rise to any justifiable expectation on the part of prisoners that they would not be transferred for any reason or no reason. Had the state law been to the contrary, it was possible that inmates would have had a liberty interest in not being transferred which could not have been abridged without procedural due process.

The prisoners in this case argue that, unlike the inmates in Meachum and Montanye, they did have a legitimate expectation under California law and prison custom that they would not be

subjected to a lockdown unless a certain specified condition -- the existence of an emergency -- was met. They argue that they were therefore entitled to a hearing before an impartial fact-finder at some point soon after the lockdown was imposed.

We have difficulty finding support for the plaintiffs' contentions in the California prison regulations or practices. Section 4402 of the Rules and Regulations of the Director of Corrections simply provides that "[e]ach institution head must have in effect at all times a plan, approved by the Director, for meeting emergencies, such as riots, strikes, attacks upon inmates, visitors or staff, explosions or fires, suicides or attempted suicides or accidental injuries to inmates or visitors and employees." The variety and inclusiveness of this list suggest that the regulation is not intended to impose fixed conditions upon the warden's exercise of his authority. In any event, it is undisputed that there were "attacks upon inmates" which led the warden to implement the prison's Disturbance Control Plan and impose the lockdown. We do not understand the prisoners to be

seeking a hearing merely to determine whether in fact such attacks took place. They wish a hearing to determine whether the increased level of security represented by the lockdown was justified by the emergency. Yet nothing in the regulations nor, in our view, in the customs of the prison is sufficiently specific to create a justifiable expectation of any particular level of prison-wide security. That omission distinguishes the present case from those in which prisoners were held to be entitled to procedural due process. We do not find here the equivalent of a statute conferring a particular benefit, such as good behavior time or parole, with a specification of conditions under which that benefit can be lost. See Wolff v. McDonnell, 418 U.S. 539 (1974); Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 99 S.Ct. 2100 (1979). The regulations here do not purport to enumerate specific reasons for which a prisoner can be placed in solitary confinement and to require documentation of those reasons. See Wright v. Enomoto, 462 F.Supp. 397 (N.D. Cal. 1976), aff'd mem., 434 U.S.

1052 (1978). Nor are prisoners being subjected to treatment wholly outside the foreseeable consequences of criminal conviction, such as commitment to a mental institution in the absence of a mental disease or defect. See Vitek v. Jones, ___ U.S. ___, 100 S.Ct. 1254 (1980). Here were have only a regulation requiring a warden to have a plan for meeting emergencies, along with a non-exhaustive list of possible emergencies.

It is certainly true that in the ordinary course of events prisoners expect that there will be no lockdowns in the absence of an emergency, just as in Meachum and Montanye prisoners naturally expected that they would not be transferred in the absence of misconduct, "unless it be assumed that transfers are mindless events". 427 U.S. at 228. But the Supreme Court found that type of expectation to be too ephemeral to give rise to a due process liberty interest, and we think the same conclusion follows in the present case.

There is another fundamental defect in the procedural due process arguments of the prisoners, and it lies in the nature of the hearing they seek. In

every case cited by plaintiffs or revealed by our research in which prisoners were found to be entitled to a due process hearing, the subject of that hearing was the fate of individual prisoners, and the facts to be examined dealt with their conduct or their condition. See, e.g., Wolff v. McDonnell, supra; Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, supra; Wright v. Enomoto, supra. In this case, however, the facts in dispute are not those which would differentiate the plaintiffs from the general prison population and cause them to be subjected to distinctive treatment. The conduct of the plaintiffs is not in issue. Instead, the question to be decided is whther the degree of emergency justifies a continuation of the lockdown -- a determination involving a high degree of policy and prediction. See Gilliard v. Oswald, 552 F.2d 456, 459 (2nd Cir. 1977). To address this question, the plaintiffs urge us to fashion a hearing at which selected members of the inmate population can present their views on the advisability of a lockdown. Both the subject matter and the suggested procedure cause

us to doubt that the Constitution requires any such hearing. See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978); Alaska Airlines, Inc. v. Civil Aeronautics Board, 545 F.2d 194, 200 (D.C. Cir. 1976).

Plaintiffs rely on three cases involving procedural due process and lockdowns. All three were decided before Meachum and Montanye, supra, and in none of them was a due process hearing actually ordered. The case most supportive of plaintiffs is Labatt v. Twoomey, 513 F.2d 641 (7th Cir. 1975). There the Court held that a nine-day lockdown did not implicate due process because it was short and in response to an emergency. The court stated, however, that in some cases of a general lockdown the Constitution would require that the prisoners be given "notice of the cause of the deprivation, the reasons for its continuation, and an opportunity to respond." Id. at 646. The second case, Hoitt v. Vitek, 497 F.2d 598 (1st Cir. 1974) is more equivocal. The court held that there was no procedural due process violation in a lockdown of several weeks'

duration, but added that in the event of a long and unreasonable lockdown the prisoner could properly seek an injunction, or even damages if "the confinement was being continued in bad faith as a subterfuge for the denial of prisoners' procedural rights." Id. at 600. We do not necessarily read that language as an endorsement of plaintiffs' position but in any event we are not persuaded by it or by the dictum in Labatt that we should interpret the due process clause to require the type of hearing sought by the prisoners in this case. Our position is supported by Gilliard v. Oswald, 552 F.2d 456 (2d. Cir. 1977) in which the court rejected a claimed right to hearing of 140 prisoners administratively confined to their cells because of a prison emergency arising from a series of assaults.

The third lockdown case upon which plaintiffs rely, Johnson v. Anderson, 370 F. Supp. 1373 (D. Del. 1974) is also in accord with our views. There the court held that a lockdown of an entire cell block did not implicate procedural due process because the lockdown decision was "a rule change of general appli-

cability affecting an entire class of prisoners. Since such a rule change is not directed at particular persons, individual prisoners are neither more acutely affected by it than other members of their class nor uniquely able to bring personal knowledge to bear on the appropriateness of its implemenation." Id. at 1382. The same reasoning applies with even greater force to the lockdown of an entire prison.

We therefore hold that there is no due process right to the hearing sought by plaintiffs in this case. In so deciding we do not minimize the seriousness of a lockdown nor do we deny that administrative review of a lockdown decision might be desirable. See McGruder v. Phelps, 608 F.2d 1023 (5th Cir. 1979). We are simply unable to say that the Constitution dictates such a procedure.

EIGHTH AMENDMENT:

Prisoners are not left without any remedy against an unjustifiable or unduly oppressive lockdown. Severe conditions of confinement are subject to eighth amendment scrutiny, which plaintiffs have invoked in this proceeding. They claim

that the lockdown constituted cruel and unusual punishment, and rely primarily on Jefferson v. Southworth, 447 F. Supp. 179 (D. R.I. 1978), aff'd, 616 F.2d 956 (1st Cir. 1980). In that case, however, the district court was faced with a prison administration which was either unable or unwilling to deal with extreme conditions which the court had previously found to be cruel and unusual punishment. Palmigiano v. Garrahy, 443 F. Supp. 956 (D. R.I. 1977), aff'd, 616 F.2d 598 (1st Cir. 1980). The Director of Corrections in Jefferson imposed the lockdown within a few weeks of the district court's decision in Palmigiano and apparently in response to it. There was, the district court found, no emergency necessitating the lockdown and the Director had announced his intention to continue the lockdown indefinitely. Neither the extreme conditions of Palmigiano nor the apparent bad faith of prison authorities in Jefferson v. Southworth find a parallel in our case.

Nor do the conditions imposed during the emergency lockdown at San Quentin fall within our ruling in Spain v. Procunier, 600 F.2d 189 (9th Cir. 1979).

In Spain we affirmed a decision of a district court that confinement of six prisoners with an almost total absence of outdoor exercise was cruel and unusual punishment, and we upheld the court's order requiring at least one hour of such exercise per day, five days per week "unless inclement weather, unsual circumstances, or disciplinary needs made that impossible." Id. at 199. The present case, however, confronts us with the unusual circumstances reserved in Spain; this lockdown was in response to a genuine emergency. The measure was temporary and plaintiffs here were allowed approximately the minimum exercise mandated in Spain within a month after the imposition of the lockdown. Other restrictions were eased as the prison administration determinted that the emergency permitted. These decisions are delicate ones, and those charged with them must be given reasonable leeway. See Hoitt v. Vitek, 497 F.2d 598, 601 (1st Cir. 1974); Gilliard v. Oswald, 552 F.2d 456, 459 (2nd Cir. 1977). The court below carefully reviewed the restrictions of the lockdown in light of the emergency at the prison and

determined that they did not cross the eighth amendment line. We agree with that conclusion.

Affirmed.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ART HAYWARD JR., et al.,
Plaintiffs,
v.
RAYMOND K. PROCUNIER, et al.,
Defendants.

NO. C-75-0653-WAI

ORDER

The above-entitled action having come duly on for trial before the Honorable Owen E. Woodruff, Jr., United States Magistrate, and Findings of Fact and Conclusions of Law having been made

and filed with the Court on February 16, 1978; and

Objections to said Findings of Fact and Conclusions of Law, pursuant to Local Rule 410(b), having been filed by plaintiffs on February 24, 1978, and defendants' brief in response having been filed on March 10, 1978; and

The Court having made a de novo review of the file as required by 28 U.S.C. §636(b)(1)(B),

IT IS HEREBY ORDERED that the said Findings of Fact and Conclusions of Law be amended to delete the citation of Cruz v. Skelton, 543 F.2d 86 (5th Cir. 1976) from Conclusion of Law No. 7, p. 26, ln. 21. As so amended, said Findings of Fact and Conclusions of Law are hereby approved and adopted by the Court, and that defendants and each of them have judgment in accordance herewith.

Dated: September 14, 1978

WILLIAM A. INGRAM
United States District Judge

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ART HAYWARD JR., et al.,

Plaintiffs,

v.

RAYMOND K. PROCUNIER, et al.,

Defendants.

CIVIL NO. C-75-0653 WAI

MAGISTRATE'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

Jurisdiction of the Court is invoked under the United States Constitution, and particularly the provisions of the First, Eighth and Fourteenth Amendments

thereto, and under the laws of the United States, particularly Title 42 of the United States Code, section 1983. Plaintiffs' claim for declaratory relief is based upon the provisions of Title 28 of the United States Code, sections 2201 and 2202. The Court has jurisdiction of this cause under the provisions of Title 28 of the United States Code, section 1343.

SUBSTANCE OF THE ACTION

This action arises out of incidents which occurred on December 19, 1974, and action by state authorities subsequent thereto which has been described as "lockdown". Plaintiffs' contentions are that the extent and duration of the "lockdown" and the nature and duration of the conditions of confinement subsequent to December 19, 1974, were such as to constitute a denial of due process and the imposition of cruel or unusual punishment.

Defendants contend that the nature and extent of what has been described as a "lockdown" was not such as described by plaintiffs, that the nature and extent of conditions existent after December 19, 1974, were not such as to constitute a

denial of due process or to be the imposition of cruel or unusual punishment.

It is undisputed that the actions of state officials on December 19, 1974, effected a change in the conditions of confinement of inmates incarcerated in the East Cell Block (the nature, extent and duration of such changes being a matter of dispute as set forth below). It is further undisputed that plaintiffs were not individually provided with any prior notice of the lockdown decision; that the plaintiffs were not given either prior to or immediately following imposition of what plaintiffs characterize as a lockdown a hearing or other opportunity to respond before an impartial board or official; that plaintiffs were not given an opportunity to cross-examine witnesses or to present witnesses, evidence or arguments; and that plaintiffs were not provided with counsel or counsel substitutes. The unavailability of a hearing and other procedural due process rights incident thereto does not include the ability of plaintiffs to pursue a state habeas corpus in connection with either the lockdown or the conditions of confinement incident thereto.

Further, the unavailability of a "hearing" does not include review of inmates' files prior to the release of workers subsequent to December 19, 1974, or the continuing classification process at San Quentin.

It is also undisputed that plaintiffs do not contend in this action than any procedural due process protection should have preceded the imposition of what has been characterized as a "lockdown". Rather plaintiffs confine their procedural due process claim to the period following the imposition on December 19 of the "lockdown" decision.

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Appendix C

DISPUTED FACTUAL ISSUES

The necessity for th continuation of what has been characterized as a "lockdown" in terms of its extent and duration is in dispute between the parties to this case. The nature, extent, and duration of the conditions of confinement in East Block subsequent to December 19, 1974, are in dispute between the parties. These conditions of confinement include, but are not necessarily limited to, such items as: confinement to cells; broken windows; meals; clothing and towels; cleaning supplies; exercise; showers; canteen; schooling; law library; entertainment and visiting. It is also disputed by the parties as to whether the inmates at San Quentin had actual notice that a "lockdown" would result from incidents of December 19, 1974. It is further disputed between the parties that inmates at San Quentin were reviewed by prison officials concerning their security classification for immediate release as a worker and it is further disputed between the parties that the classification process at San Quentin was on-going during this period of time. It is further disputed between these par-

ties that these "hearing", administrative appeal and the availability of state habeas corpus constitute a sufficient provision for review to satisfy any possible requirement of due process applicable to this case.

The case was tried to the Court commencing November 7, 1977, Robert A. Goodin of Heller, Ehrman, White and McAuliffe appearing as counsel for plaintiffs, and Mr. Kenneth Young of the California Attorney General's Office appearing as counsel for defendants. The Court having considered the evidence, argument and papers submitted to the Court for decision, the Court being fully advised now makes findings of fact and conclusions of law as follows:

FINDINGS OF FACT

1. Plaintiff Art Hayward was an inmate at East Block, San Quentin State Prison, in the County of Marin, State of California during the period October 9, 1974 through May 27, 1975. Plaintiff Hayward is presently residing in San Francisco, California, and has been discharged from custody. Trial Transcript (hereinafter "Tr.") Vol. I, p. 5, ln. 10-20, Exhibit BR-2.

2. Plaintiff Morris Brown was an inmate at East Block, San Quentin State Prison, in the County of Marin, State of California, during the period January 21, 1975 through April 17, 1975. Plaintiff Brown is currently residing in San Francisco and is currently on parole. Tr. Vol. I, p. 21, ln. 22 through p. 22, ln. 5, Exhibit BR-3.

3. Plaintiff Michael McNabb is an inmate in West Block, San Quentin State Prison, in the County of Marin, State of California. During the period February 19, 1974 through May 7, 1975, plaintiff Michael McNabb was an inmate in the East Block of San Quentin State Prison. Tr. Vol. III, p. 19, ln. 8-12, Exhibit BR-4.

4. Defendant J. J. Enomoto is presently Director of the California Department of Corrections. Joint Pretrial Conference Statement, p. 1.

5. Defendant George W. Sumner is presently Warden of San Quentin State Prison, in the County of Marin, State of California. Joint Pretrial Conference Statement, p. 1.

6. During 1974, East Block house "main line" inmates were those who were

given security classifications of I or II. Inmates with a security classification of I are defined as "inmates who have demonstrated over a period of time that they are no threat to staff or other inmates". Inmates in category II are defined as "inmates who have not demonstrated that they need special housing or are not ready for Category I". Tr. Vol. III, p. 58, ln. 5, p. 59, lin. 19, Exhibit 31.

7. During 1974, prior to December 19th of that year, prison routine for inmates in East Block began with a morning count to assure everyone's presence. Immediately thereafter, inmates were escorted in staggered groups to the Mess Hall for a hot breakfast. Following breakfast, those residents of East Block who were assigned to a prison job reported to work. Residents of East Block without job assignments were returned to their cells and stayed there the rest of the morning. At noon, all inmates were served another hot meal in the Mess Hall, following which assigned inmates returned to their jobs and non-assigned inmates were permitted to utilize the exercise and gymnasium facili-

ties in San Quentin's lower yard until the time necessary to return for the evening count. At approximately 4:00 p.m. the evening count took place, and following the count East Block residents were escorted to the Mess Hall for a hot dinner.

After dinner inmates were permitted night movement as required for a variety of programs and entertainment, including night school, self-help programs, movies, etc. Following night movement, all residents of East Block, except those working on the night shift, were confined to their cells until breakfast.

In addition to the out-of-cell time reflected in the description of the East Block routine contained in finding 7 hereinabove, East Block residents also spent out-of-cell time in so-called "ducated" movement. "Ducated" movement consists of movement for specific purpose, e.g., dental, medical, visiting, classification hearing, etc., pursuant to a written order or "ducat". Tr. Vol. II, p. 9, ln. 15 through p. 12, ln. 7.

8. During 1974, prior to December 19th of that year, showers for East Block residents were provided on a

rotating basis, which typically resulted in a minimum of two showers per week for each inmate. Tr. Vol. II, p. 13, ln. 7-23.

9. During 1974, prior to December 19th of that year, at the time of showers, inmates were given a clean set of "white clothing", e.g., shorts, T-shirts, etc. Inmates were given an opportunity to exchange so-called "blue clothing", e.g., outer shirts and pants, once per week. Tr. Vol. II, p. 13, ln. 24 through p. 14, ln. 8.

10. During 1974, prir to December 19 of that year, cleaning supplies for cell cleaning activities were supplied in bulk to East Block weekly. These supplies were broken out and delivered upon request to inmates as needed. Tr. Vol. V, p. 50, ln. 16-25, Tr. Vol. II, p. 14, ln. 9-25.

11. During 1974, prior to December 19th of that year, residents of East Block also enjoyed a variety of privileges, including visiting rights, movie attendance, course and/or school attendance, and daily use of the canteen from which they could purchase food and personal items. Tr. Vol. II, p. 11, ln. 20

through p. 12, ln. 7; p. 15, ln. 4-17.

12. Prior to December 19, 1974, the California Department of Corrections, and San Quentin State Prison, experienced increasing levels of violence. Defense Exhibits: 0-1 through 165; R; S-1, 2, 3, 4, 5, 6; T; U and V. Defense Testimony: Britt - III, 129-130, 131-133.

13. Between 1970 and 1974 the level of incidents within the Department of Corrections increased from a rate of 1.36 to 4.30 per 100 average institution population. Defense Exhibits: R; T (p. 1-2).

14. Much of the violence within the Department of Corrections was gang and/or racially oriented. Defense Exhibits: R; S1, 2, 3, 4, 5, 6, (pp. 2 & 3); T; Y-3 (pp. 15-17, 18). Defense Testimony: Britt III, 135-142, IV, 46-47.

15. During the year prior to December 19, 1974, San Quentin experienced increasing levels of violence. Defense Exhibits: 0-1 through 1165; R; S-1, 2, 3, 4, 5, 6 (p. 3); T; U and V (Rpts. from 1/2/74 through 6/1/75). Defense Testimony: Hayward Deposition V, 140-141.

16. Between 1970 and 1974 the incident rate at San Quentin went from 1.99 to 6.28. Defense Exhibit: R.

17. A major portion of the incidents at San Quentin were gang and/or racially oriented. Defense Exhibits: 0-1 through 165; R; S-1, 2, 3, 4, 5, 6 (p. 3); T; U and Y-3 (pp. 15-17, 18). Defense Testimony: Britt - III, 136, 141-142, IV, 46-47, 49-50, 82-150; McNabb Deposition - VI, 141-142.

18. During 1974 San Quentin experienced 197 incidents including 82 assaults with weapons (12 fatalities), 7 fights, 71 possession of weapons and 2 attempted escapes. Defense Exhibits: 0-1 through 165; P (BR-1); Q-16 through 170; R; S-1, 2, 3, 4, 5, 6 (p. 3); U and V (Rpts. 1/2/74 through 6/1/75).

19. Different gangs tend to predominate or control different institutions within the Department of Corrections. Defense Exhibits: S-1, 2, 3, 4, 5, 6 (pp. 2 & 3); T and Y-3 (pp. 15-17, 18). Defense Testimony: Britt - III, 136, 138-139.

20. This factor, and rivalries between gangs, interferes with the ability to transfer inmates from one

institution to another. Defense Testimony: Britt - III, 135-136, 138-141; IV, 51-53.

21. It is difficult to ascertain the membership of the gangs. Defense Exhibits: S-1, 2, 3, 4, 5, 6. Defense Testimony: Britt - III, 143-145; IV, 50-51, 81-82, 150-152.

22. Gang influence is pervasive, instructions are known to have been passed from leaders to members from segregation units and from one institution to another. Defense Exhibits: Y-3 (pp. 15-17, 18). Defense Testimony: Britt - IV, 71-74, 150-152.

23. Penalties imposed by the gangs are generally death. Defense Testimony: Britt - IV, 46, 48-49.

24. Gang influence spreads beyond immediate membership. Defense Exhibits: S-1, 2, 3, 4, 5 abd 6. Defense Testimony: Britt - IV, 82-83.

25. Gang oriented incidents have expanded to become racial in nature. Defense Exhibits S-1, 2, 3, 4, 5 and 6; Y-3 (p. 17). Defense Testimony: Britt - III, 142-143.

26. At the time pertinent to this case the major gangs at San Quentin were

the Aryan Brotherhood ("AB"), the Black Guerilla Family ("BGF"), and the Mexican Mafia ("EME"). Defense Exhibits: S-1, 2, 3, 4, 5, and 6 (p. 3); and T. Defense Testimony: Britt - III, 135.

27. As used within the California Department of Corrections the term "lockdown" has no readily defined meaning. The term as used by the Department of Corrections may be generally defined as:

a. action, affecting all or part of a prison, in which, as a response to an incident or incidents of violence, inmates are returned to their cells;

b. the term is also used to describe the state of affairs following the initial action where security measures are maintained in excess of those extant prior to the "lockdown" but they are not seen as permanent revisions of pre-existing procedures. Defense Testimony: Britt - IV, 59-61, 61-63, 152-153, 154-155.

28. The duration of a "lockdown" may not be judged from the continued usage of the term since:

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a. Increased security restrictions may be permanently adopted in an effort to control violence;
b. security restrictions may be relaxed but have not either become permanent or returned to pre-existing levels;
c. new incidents of violence may necessitate a new "lockdown" and subsequently increased security measures.

29. The term "lockdown" is only useful to describe the initial action, responsive to an act or acts of violence, in which inmates in all or part of an institution are confined to their cells. Thereafter conditions of confinement must be specifically analyzed at any particular point in time and may not be deemed to be of a set character by reason of the use of the term "lockdown".

30. In December of 1973 San Quentin, together with other major institutions, was the subject of a departmental "lockdown" as part of an effort to control increasing violence within the correctional system. Defense Exhibits: S-1, 2, 3, 4, 5 and 6; T; AB; AC and AD. Defense Testimony: Britt - III, 133, IV,

54-55. Weber V, 18-19.

31. In connection with this "lock-down" new categories were created, all inmates were screened with respect to violence potential, and a program of increased security measures, with particular emphasis upon weapons control, was instituted. Defense Exhibits: S-1, 2, 3, 4, 5 and 6; T; V (Rpts. 1/2/74 through 6/1/75); AA; AB; AC and AD. Defense Testimony: Britt - IV, 56-57, 65-66, 83-84. Weber -V, 18-19.

32. The accompanying departmental reorganization affected San Quentin's population in terms of size and character. Defense Exhibits: S-1, 2, (p. 4), 3, 4, 5 (p. 2) and 6; Y-3 (p. 17); AF. Defense Testimony: Britt - IV, 57-59.

33. San Quentin received from other portions of the system inmates who were, or potentially were, disruptive. Defense Exhibits: S-1, 2 (p. 4), 3, 4, 5 (p. 2) and 6; Y-3 (p. 17). Defense Testimony: Britt - IV, 57-59.

34. This factor, together with gang rivalries, meant that San Quentin's violence problems had to be worked out at that institution. Defense Testimony: Britt - III, 135, 136, 138-141; IV 51-53, 57-59.

35. San Quentin's population remained at a high level. Defense Exhibits: S-1, 2 (p. 4), 3, 4, 5 (p. 2) and 6; AF.

36. There were subsequent "lock-downs" at San Quentin during 1974. Conditions at San Quentin never returned to the pre-December 1973 format. Defense Exhibits: S-1, 2, 3, 4, and 5; T; AB; AC; AD and AE. Defense Testimony: Britt - IV, 61-70.

37. During 1974 several suggestions were made concerning operations at San Quentin and several methods to control violence were attempted. Defense Exhibits: S-1, 2, 3, 4, 5 and 6; T; V (Rpts. 1/2/74 through 6/1/75); W; X; Y-1, 2 and 3: Z; AA; AB; AC; AD and AE. Defense Testimony: Britt -IV, 61-70, 75-81, 83-85.

38. During 1974 the major option appeared to be closing the institution. Defense Exhibits: AG-6 and AG-9. Defense Testimony: Britt - IV, 85, 125.

39. Despite measures taken to prevent violence, during 1974, 170 incidents occurred at San Quentin, including 82 assaults with weapons with 12 fatalities for an incident rate of 6.28 compared with 1.99 in 1970. Defense

Exhibits: 0-1 through 165; P (BR-10); Q-167 through 170; R; S-1, 2, 3, 4, 5 and 6; U and V (Rpts. 1/2/74 through 6/1/75).

40. On December 19, 1974, residents of East Block, as were all other inmates at San Quentin, were placed in lockdown status. The imposition of lockdown status on the Prison represents the implementation of the institution's disturbance control plan based on the occurrence of one of several enumerated types of emergency. The authority for imposing a lockdown and the enumeration of the types of emergency for which it is authorized is contained in Section 4402 of the Rules and Regulations of the Director of Corrections of the State of California. Tr. Vol. III, p. 63, ln. 18 - p. 64, ln. 1; Exhibit 1; Tr. Vol. II, p. 4, ln. 10-25; Exhibit 35.

41. On December 19, 1974, two incidents of violence occurred, one in the South Dining Hall and the second, shortly thereafter, in the lower yard. Defense Exhibit: P (BR-1). Defense Testimony: Britt - IV, 86-96. Weber - V, 19-23.

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42. These incidents arose from a history of violence between the Black Guerilla Family and the Mexican Mafia. Defense Exhibit: P (BR-1). Defense Testimony - Britt - V, 163.

43. Two inmates were killed in these incidents. Defense Exhibit P (BR-1).

44. Although consideration was given after the first incident to the possibility that the violence could be contained, the nature of the second incident showed a potential for wide-spread violence. Defense Exhibit: P (BR-1). Defense Testimony: Britt - IV, 93-94, 94-96. Weber - V, 22-23. Nyberg - V, 83.

45. The initial incident involved gang members housed in segregation units. Defense Exhibit: P (BR-1). Defense Testimony: Britt - IV, 92-93, 94 and 95.

46. The second incident involved the general population and appeared to be a gang attack on non-gang members. Defense Exhibit: P (BR-1). Defense Testimony: Britt - IV, 94-95, V, 5-6. Nyberg - V, 83.

47. The gangs and inmates involved were of different racial origins.

Defense Exhibit: P (BR-1). Defense Testimony: Britt - IV, 86.

48. The incidents held the potential for racial violence. Defense Exhibit: P (BR-1). Defense Testimony: Britt - V, 5-6.

49. The decision to "lockdown" the institution was made in light of the two incidents of violence of December 19, 1974, their nature and the background of violence at San Quentin. Defense Exhibit: P (BR-1). Defense Testimony: Britt - IV, 94-96.

50. The decision to place San Quentin on lock down status on December 19, 1974 was made by the then-Warden Kenneth Britt. In imposing the lock down status, prison authorities acted pursuant to Section 4402 of the California Rules and Regulations of the Director of Corrections of the State of California and San Quentin's disturbance control plan promulgated pursuant thereto. The decision to impose a lock down on San Quentin on December 19, 1974, represented a judgment by Warden Britt that a state of emergency existed at San Quentin on December 19, 1974. Tr. Vol. III, p. 62, ln. 10 - p. 63, ln. 17; p. 64, ln. 2-18; Exhibit 1; Tr. Vol. II, p.

4, ln. 10-25; Exhibit 35; Tr. Vol. IV, p. 154, ln. 1 -p. 155, ln. 16.

51. None of the named plaintiffs was in any way involved in or responsible for the altercation on December 19, 1974, which precipitated the lock down which commenced on that date. Further, of the class which these plaintiffs represent pursuant to this Court's order of October 19, 1977, the only members who were in any way involved in or responsible for the altercation which occurred on December 19, 1974, and which precipitated the lock down which commenced on that date are those identified in defendants' response to plaintiffs' Interrogatory 20, at page 114, line 1, through page 16, line 19, of defendants' consolidated response to plaintiffs' first set of interrogatories. Tr. Vol. III, p. 92, ln. 14 - p. 95, ln. 20; Tr. Vol. IV, p. 45, ln. 10-16.

52. Inmates at San Quentin had prior notice that incidents of this sort would result in a "lockdown" because of prior lockdowns which had occurred at San Quentin in response to incidents of violence. Defense Testimony: Britt IV, 61-63, 92. Weber - V, 22. Nyberg - V, 83. Hayward Deposition - V, 139-140.

53. Subsequently, inmates were periodically given notice of the nature and extent of security procedures at San Quentin and the extent to which various programs were available to them.

a. Broadcasts were made over KSO News, a regularly scheduled broadcast. This program, and others, was available in the cells via an "intercom" system using earphones. At least 70% of the inmates in East Block had this available.

b. The San Quentin Newspaper, intended to provide such information, was delivered to East Block and was either available to them incident to meals or was delivered to the cells.

Defense Exhibits: AG-1 (p. 3); AW 1, 2 and 3; AX. Plaintiffs' Exhibits: PX 32. Defense Testimony: Britt - IV, 103-105. Nyberg - V, 83-34. Gard - V, 124-127. Hayward Deposition -V, 145-148. Interrogatories V, 151, 152. Worster - VI, 57-59, 70-71. Bolton - VII, 6-8. Hahn - VII, 11-14.

54. Hearings concerning degree and conditions of confinement are and were available within the California Department of Corrections by the Director's

review of institutional action, the inmate classification process and the inmate appeals procedure. Defense Testimony: IV, 141-142; V, 10-11, 31; VI, 33-34, 35-36, and 93. Plaintiffs' Exhibit: PX 1.

55. If departmental remedies are unavailing, inmates have state habeas corpus with which to challenge degree and conditions of confinement.

56. Immediately after the "lockdown", priority was given by institutional officials to the restoration of essential services such as hot meals, visiting, laundry and canteen as soon as possible. Defense Exhibits: AG-1 (p. 3) and AH. Defense Testimony: Britt - IV, 97-103, 117.

57. Subsequent to the "lockdown" institutional officials were concerned with and attempted to ameliorate the maximmum security precautions imposed at San Quentin as soon as possible consonant with safety to inmates and staff. Defense Exhibits: AG-1 (p. 3) and AH. Defense Testimony: Britt -IV, 97-103, 117.

58. Beginning immediately after the "lockdown", inmate workers needed to provide essential services at the insti-

tution, were screened to see whether they could be safely released for operation of the services with safety. Defense Exhibits: AG-1 (p. 3); AG-6 and AG-8. Defense Testimony: Britt - IV, 97-98, 117.

59. Throughout the period in question in this case inmates were screened to see if they could be safely released for work assignments as programs at the institution began operating. Defense Exhibits: AG-1 (p. 3); AG-6 and AG-8. Defense Testimony: Britt - IV, 97-98, 169-170. Weber - V, 38, 39-40. Worster - VI, 32-33. Hahn - VII, 73.

60. Initially, such workers who were not already in an honor or semi-honor unit were transferred to North Block when work assignments were received by them, although, throughout this period a certain number of inmate workers were housed in East Block. Defense Exhibits: AG-3, AG-5, AG-6, AG-7, AG-8, AI-1 (pp. 1, 2) and AJ. Defense Testimony: Hayward Deposition - V, 148-49. Worster - VI, 34. Hahn, VII - 26.

61. Conversely those without work assignments would be transferred to East Block. Defense Exhibits: AG-3, AG-5,

AG-6, AG-7, AG-8, AI-1 (pp. 1 & 2) and AJ. Defense Testimony: Hayward Deposition - V, 148-149. Worster - VI, 34.

62. At, and immediately after, December 19, 1974, East Block housed primarily unassigned inmates. During 1975 its character was changed. It then primarily housed assigned workers. Defense Testimony: VI, 40-41; VII, 26.

63. Throughout the period in question in this case institutional personnel used all formal and informal sources of information at their disposal to evaluate the temper of the institution with a view to reducing maximum security precautions when it appeared that this could be done with safety. Defense Exhibit: AG-1 (p.3). Defense Testimony: Britt - IV, 96-97, 103, 113-117, 143-144. Weber - V, 23-26. Worster - VI, 56-57.

64. On at least one occasion a relaxation of security procedures had to be rescinded because of a new incident involving East Block. Defense Exhibit: Q-184 (BR-1). Defense Testimony: Britt - IV, 118-120. Worster - VI, 52-54. Hahn - VII, 26-27.

65. Subsequent to December 19, 1974, violent incidents occurred at San

Quentin involving East Block and weapons were found in the Block. Defense Exhibits: Q-167 through 234, particularly sub-numbers: 172, 175, 186, 194, 206, 220, 221, 223 (BR-1);[1] V (Rpts. 1/2/74 through 6/1/75); AG-6, AZ (pp. dated 12/31/74, 1/4/75) and BA-1 through 4 (particularly dates of 12/31/74, last page of BA-1, 3/1/75, 3/4/75). Defense Testimony: Britt - IV, 118-120; V, 14-15. Worster - VI, 52-54, 55. Riley - VI, 124-126. Hahn - VII, 26-27, 44, 81.

66. To operate the institution as safely and effectivly as possible, overtime was required of institutional personnel and non-custodial personnel were assigned to custody positions. Defense Exhibits: AG-1 (3), AG-2, AG-3, AG-5, AH and AI-1. Defense Testimony: IV, 100, 124; V, 26-27, 29; VI, 75, 98.

67. At this time institutional personnel concluded that because of the level of violence at San Quentin and prior experience with violence at San Quentin it would be necessary to make a

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[1] Exhibit explained by testimony VI, 67-69. Correlation of 103b cards (BR-1) with incident reports (Q-167-234) was prepared by Attorney General Staff. It is attached hereto as an appendix.

complete reorganization of San Quentin structurally and procedurally to provide for its operation in maximum safety. Defense Exhibits: AG-1 (p. 3), AG-2, AG-3 and AG-6. Defense Testimony: Britt - V, 120-124, 125-126, 156-163. Nyberg - V, 72-82, 85. Shepherd - VI, 9-26.

68. Because the conditions at San Quentin required maintenance of maximum security, operating procedures were formalized on a short term basis, pending the long-term reorganization, to reorganize programs and staff at San Quentin. Defense Exhibits: AG-1 (p. 3), AG-3, AG-7, AG-8, AH and AI-1 and 2. Defense Testimony: Britt - IV, 120-124, 156-163.

69. This short term reorganization was memorialized in two memoranda, one bearing a date of January 12, 1975, and another undated, which took effect in the latter part of February, 1975. Defense Exhibits: AG-1 (p. 3), AG-3, AG-7, AG-8, AG-9, AH, AI-1 and 2 (and compare visiting dates, Ex. BP) and AJ. Defense Testimony: Britt - IV, 120-124. Weber - V, 27-31. Worster - VI, 54-55. Hahn - VII, 23-25.

70. Throughout the period in question in this case, detailed planning was done at the institution, in conjunction with departmental headquarters in Sacramento, on a long-term structural and procedural reorganization at San Quentin. Defense Exhibits: AG-1 (p. 3), AG-2, AG-3, AG-4, AG-6, AG-7, AG-8, AG-9, AK, AL, AM, AN and AO. Defense Testimony: Britt -IV, 126-132. Nyberg - V, 72-82, 85. Shepherd - VI, 9-17.

71. These plans for a long-term reorganization were approved and implementation was begun in approximately March of 1975. Defense Exhibits: AF, AG6, AP, AQ, AR, AS-1 through 9, AT, AU and AV. Defense Testimony: Britt - III, 125-126, 130-132. Nyberg - V. 72-82. Ingram - V, 100-101. Thomas -V, 105-111. Shepherd - VI, 9-17, 17-20, 28-29. Worster -VI, 38-45, 45-46. McHenry - VI, 101-103. Kesner - VI, 107-108, 112-113. Hahn - VII, 16-17, 18-22.

72. What occurred in the period December, 1974, through March, 1975, at San Quentin may be summarized as follows:

a. A "lockdown" occurred on December 19, 1974. While condi-

tions of a nature which could be defined as a "lockdown" as discussed above existed for some few days thereafter, institutional officials almost immediately began efforts to ameliorate the conditions incident to the "lockdown" insofar as possible consonant with safety of inmates and staff.

b. What occurred thereafter was what may be described as short-term reorganization of San Quentin for its operation under maximum security precautions pending a long-term reorganization.

c. After the lockdown, plans were immediately formulated for a long-term procedural and structural reorganization of San Quentin. These plans were formulated, approved and implementation was begun by March of 1975.

d. What occurred after the "lockdown" was not a continuation of the "lockdown" but a change of San Quentin, procedurally and structurally, into an institution with a higher degree of security.

73. By mid-January, 1975, a significant amount of out-of-cell time was pro-

vided for East Block inmates. Defense Exhibits: AH, AI-1 and AJ. (See findings relating to meals, yard exercise, showers and visiting. See also entries relating to visits, medical and dental appointments, etc., in Ex. AY.)

74. The outside windows in East Block were being constantly broken by inmates. Institutional personnel did replace broken windows and made reasonable efforts to do so as promptly as possible. Defense Exhibits: BC, BD and BE. Defense Testimony: Britt - IV, 133-136, 149-150. Weber - V, 31-32. Hayward Deposition - V, 141, 145. Interrogatories V, 152-153. Shepherd - VI, 21-25, 26, 27. Worster - VI, 51. Riley - VI, 124-126. Hahn - VII, 43-44.

75. With respect to meals after the lockdown the following occurred:

a. After December 19, 1974, bag meals, two per day, were distributed to inmates in their cells. This continued with the exception of at least one hot meal on or about December 27, until December 31, 1974.

b. Thereafter one hot meal a day plus a sack lunch was served until January 12, 1975.

c. Thereafter two hot meals a day were served and later a bag supplement was provided.

d. Providing meals was a lengthy process. Constant supervision was maintained enroute and during the meal and all inmates were searched entering and leaving the mess hall.

e. The hot meals referred to above were served in the mess hall.

Defense Exhibits: AG-1 (p. 4), AG-4, AG-7, AH (pp. 11, 12-12A), AI-1 (pp. 3, 4-5), AJ, AY (pp. dated 1/2/75, 1/3/75, 1/9/75, 1/21/75), AZ (pp. dated 12/19/74, 12/29/74, 1/1/75, 1/4/75, et. seq.),[2] BA-1 (pp. dated 12/26/74 and 12/27/74),[3] BA-2 (pp. dated 1/12/75, 1/13/75, 1/14/75, 1/15/75, 1/16/75, 1/19/75, 1/21/75, 1/22/75, 1/24/75, 1/26/75), BA-3 (pp. dated 2/3/75, 2/16/75, 2/23/75, 2/24/75, 2/27/75, 2/28/75), BA-4 (pp. dated, 3/1/75, 3/2/75, 3/4/75, 3/18/75). BF, BG, BH-1 & 2, BI-1 & 2 and BV. Defense Testimony: Britt - IV, 99-101, 136-137, 146-148. Beckman - V, 89-94, 97-98.

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2 Exhibit explained by testimony VI, 61-62.

3 Exhibit explained by testimony VI, 88, et. seq.

Thomas, V, 104-111, 111-114, 119-120, 120-122. Worster - VI, 46-48, 77, 84-85. Kennedy - VI, 91-92, 95. Kesner - VI, 109-110, 111-112, 114. Riley - VI, 121-122, 122-123, 130-131, 135-137, 138. McNabb Deposition - VI, 140, 142-143. Brown Deposition - VI, 145-151, 153. Hahn - VII, 27-28, 29, 30-33.

76. The warden consulted with appropriate officials with respect to the nutritional adequacy of meals provided inmates. Defense Testimony: Britt - IV, 136-137. Beckman -V, 90.

77. The mess halls were cleaned continuously during the feeding operations and they were clean. Defense Testimony: Thomas - V, 114-115. Kesner - VI, 110-111.

78. Laundry operation was suspended for only approximately a week after December 19, 1974. Defense Exhibits: AH (p. 11) and BK-1 through 3.[4] Defense Testimony: Britt - IV, 137. Bruccoleri - V, 55-63, 64-65, 69-70.

79. Although some shortages were experienced, deliveries of clean cloth-

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4 A typed copy of the list attached to Exhibit BK is attached hereto as an appendix.

ing were made to East Block on dates as set forth in the testimony of Sargeant Bruccoleri in his review of Exhibit BK. Defense Exhibits BK-1 through 3. Defense Testimony: Bruccoleri - V, 57-62.

80. No severe shortage of clean clothing or towels is shown by the evidence in this case. Defense Exhibits: BK-1 through 3. Defense Testimony: Bruccoleri - V, 55-63, 64-65. Riley - VI, 117-119. Brown Deposition - VI, 151-152. Hahn -VII, 41-42.

81. No shortage of cleaning supplies is shown by the evidence in this case. Defense Exhibit: BJ. Defense Testimony: Bruccoleri - V, 49, 51-54, 55, 67-68. Shepherd -VI, 25-26. Riley - VI, 123-125. Hahn - VII, 42-43.

82. Yard Exercise for East Block inmates recommenced on approximately January 16, 1975. Defense Exhibits: AJ, AY (p. dated 1/16/75), AH and AI-1. Defense Testimony: Worster -VI, 51-52. Kesner - VI, 111-112. Riley - VI, 122, 130-131. Hahn - VII, 33-35, 79-80.

83. Within a few days after December 19, 1974, showers were provided East Block inmates. Inmates were first showered in small groups under close custodial control. Special crews were

created at the institution to facilitate showering. Showering was available approximately once a week and efforts were made to achieve a goal of at least two showers per inmate per week. Defense Exhibit: AH (pp. 9, 11, 15). Defense Testimony: Britt - IV, 138, 144-145. Worster - VI, 50-51, 85-87. Riley VI, 115-117, 127-129, 131-132, 135-137. McNabb Deposition - VI, 139-140. Brown Deposition - VI, 144-145. Hahn - VII, 39-41.

84. Limited canteen was provided East Block by December 26, 1974, and modified canteen once-a-day per week by January 12, 1975, and full canteen by March 19, 1975. Initially after December 19, 1975, "shopping lists" from inmates were filled by institutional personnel. Subsequently groups of ten to fifteen inmates were escorted to the canteen. Subsequently canteen was available incident to meals. Defense Exhibits: AG-7, AH (pp. 11, 14), AI-1 (pp. 3,8), AJ, AZ (pp. dated 1/3/75, 1/4/75), BF, BG, BL and BM. Defense Testimony: Bruccoleri - V, 49, 53-55, 67-68. Hayward Deposition - V, 145. Worster - VI, 48-49, 85-86. Riley -VI, 119-120, 135-137. Hahn - VII, 35-36.

85. The evidence in this case shows no denial of access to courts because of any restrictions upon the use of the institutional law library. Defense Exhibits: AH (pp. 11, 16), AI-1 (pp. 3, 9), BB-1 & 2,[5] BO and BN. Defense Testimony: Hayward Deposition - V, 137-139. Interrogatories - V, 152. McHenry - VI, 97-101. McNabb Deposition - VI, 143. Brown Deposition - VI, 152, 153. Hahn - VII, 36-38.

86. Inmates had available to them in their cells radios and books and, in some instances, televisions. Defense Testimony: Hayward Deposition - V, 145-148. Interrogatories -V, 151, 152. McNabb Deposition - VI, 142.

87. No denial of "entertainment" to East Block inmates is shown by the evidence in this case.

88. Restoration of visiting received high priority at the institution. By December 25, 1974, there was restricted visiting. By December 29, 1974, visiting was allowed two days per week, three days per week by January 9, 1975, and five days a week visiting in March. Defense Exhibits: AG-1 (p. 3),

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5/Exhibit explained by testimony VI, 62-64.

AG-3, AG-7, AH (pp. 11, 13), AI-1 (pp. 3, 7), AY (p. dated 1/9/75), AZ (pp. dated 12/24/74, 12/25/74, 12/23/74, 12/25/74), BA-2 (pp. dated 1/7/75, 1/11/75, 1/12/75, 1/13/75, 1/19/75, 1/26/75, 1/27/75, BA-3 (pp. dated 2/1/75, 2/2/75, 2/16/75) BA-4 (p. dated 3/10/75), BF, BG, BP[6] and BQ.[7] Defense Testimony: Britt - IV, 99-101, 137-138. Nyberg - V, 72-82, 85. Interrogatories - V, 155. Worster - VI, 66-67. Kennedy - VI, 92-93, 93-94. McNabb Deposition - VI, 141. Brown Deposition - VI, 152-153. Hahn - VII, 38-39.

89. There is no evidence that any plaintiff was deprived of the opportunity for schooling. Defense Testimony: V, 154; VI, 141, 153.

90. Only such restrictions upon inmate activity were imposed as were necessary to maintain adequate security for the safety of inmates and staff. Defense Testimony: Britt -IV, 99-103, 154; V, 3-5.

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6 Exhibit explained by testimony VI, 64-66. A summary of these records prepared by San Quentin Staff is appended hereto as an appendix.

7 See Worster testimony for explanation.

91. Plaintiff Hayward was housed in East Block from November 13, 1974, to April 17, 1975, in Cell 1E93. Defense Exhibits: BR-4, BU-1. (See VI, 67-69 for explanation of exhibits.)

92. Plaintiff McNabb was housed in East Block from February 29, 1975, to May 7, 1975, in Cells 1E110, 3E73, and 3D70. Defense Exhibits: BR-3 and BU-2. (See VI, 67-69 for explanation of exhibits.)

93. Plaintiff Brown was housed in East Block from January 22, 1975, to April 17, 1975, in Cells 2E106 and 2E12. Defense Exhibits: BR-2 and BT. (See VI, 67-69 for explanation of exhibits.)

CONCLUSIONS OF LAW

1. The due process requirements of the Fourteenth Amendment are inapplicable to this case. Meachum v. Fano, 427 U.S. 215 (1976); Montayne v. Haymes, 427 U.S. 236 (1976); Moody v. Daggett, 429 U.S. 78 (1976); Gilliard v. Oswald, 552 F.2d 456 (2nd Cir. 1977), rehearing denied, 557 F.2d 359; Newman v. Alabama, 559 F2d 283 (5th Cir. 1977); Potter v. Clark, 497 F2d 1206 (7th Cir. 1974); Hoitt v. Vitek, 497 F2d 598 (1st Cir. 1974).

2. Due process does not require a

hearing prior or subsequent to actions by prison authorities such as were taken on December 19, 1974, by the prison administration at San Quentin. Meachum v. Fano, 427 U.S. 215 (1976); Montayne v. Haymes, 427 U.S. 236 (1976); Moody v. Daggett, 429 U.S. 78 (1976); Gilliard v. Oswald, 552 F2d 456 (2nd Cir. 1977), rehearing denied, 557 F.2d 359; Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977); Potter v. Clark, 497 F.2d 1206 (7th Cir. 1974); Hoitt v. Vitek, 497 F.2d 598 (1st Cir. 1974); Hodges v. Klein, 421 F.Supp. 1224 (D.M.J. 1976).

3. The federal Constitution does not require that subsequent to actions such as were taken by the San Quentin Administration on December 19, 1974, a hearing concerning continuation of maximum security precautions be reviewed by a civilian body outside the Department of Corrections. Meachum v. Fano, 427 U.S. 215 (1976); Montayne v. Haymes, 427 U.S. 236 (1976); Moody v. Daggett, 429 U.S. 78 (1976); Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977).

4. The actual notice to inmates of the likelihood of a "lockdown" after a violent incident, the notice to in-

mates provided by the San Quentin administration concerning the extent and duration of security precautions and consequent limitations on programs, the contacts with inmates by prison staff concerning the temper of the institution, the individual screening of inmate files, the on-going departmental classification process, the inmate appeal process, and the avilability of state habeas corpus more than adequately provide for any incidents of due process which might be held applicable to a situation such as is involved in this suit. Cooper v. Riddle, 540 F.2d 731 (4th Cir. 1976).

5. In a situation such as this where changed programs, policies and security measures were applied to inmates as a whole, a hearing concerning such changes is not required by the Fourteenth Amendment. Meachum v. Fano, 427 U.S. 215 (1976); Montayne v. Haymes, 427 U.S. 236 (1976); Moody v. Daggett, 429 U.S. 78 (1976).

6. Under the facts of this case no denial of access to court in violation of the federal Constitution is shown. Phillips v. Anderson, 386 F.Supp. 371 (E.D. Okla. 1974).

7. The state has no Eighth Amendment obligation to provide prisoners with opportunities to obtain education, attend vocational school or entertainment. Moody v. Daggett, 429 U.S. 78 (1976); Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977); Cruz v. Skelton, 543 F.2d 86 (5th Cir. 1976); Nadeau v. Helgemoe, 423 F. Supp. 1250 (D.C. N.H. 1976); Furrow V. United States Board of Parole, 418 F. Supp. 1309 (D.C. Maine 1976).

8. Reasonable limitations upon inmates' visitation rights are not violative of the Eighth Amendment. Moody v. Daggett, 429 U.S. 78 (1976); Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977); McCray v. Sullivan, 509 F.2d 1332 (5th Cir. 1975) on remand, 399 F.Supp. 271 (M.D. Ala. 1975).

9. Limitations upon visitation rights as shown in this case were reasonable. (See authorities cited under Conclusion No. 8.)

10. It is not an infliction of cruel and unusual punishment where limitations or deprivations are incident to reasonable actions intended to preserve the safety of the inmates at

the institutuion. Gilliard v. Oswald, 552 F.2d 456 (2nd Cir. 1977), rehearing denied, 557 F.2d 359; Crowe v. Leeke, 550 F.2d 184 (4th Cir. 1977).

11. Any limitations or deprivations subsequent to December 19, 1974, were incident to reasonable actions by prison authorities necessitated by their duty to safeguard the inmates in their custody. (See authorities cited in support of Conclusion No. 10.)

12. A state's obligation under the Eighth Amendment is to furnish its prisoners with reasonably adequate food, clothing, shelter, sanitation, medical care and personal safety. Moody v. Daggett, 429 U.S. 78 (1976); Sostre v. McGinnis, 442 F.2d 178 (2nd Cir. 1971), cert. denied, 404 U.S. 1049 (1972), cert. denied, 405 U.S. 978 (1972); O'Brien v. Moriarity, 489 F.2d 941 (1st Cir. 1974); LaReau v. McDougall, 473 F.2d 974 (2nd Cir. 1972), cert. denied, 404 U.S. 878 (1973); Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977).

13. Any limitations or deprivations shown by the facts of this case were not of such a nature or of such a duration as to constitute cruel and

unusual punishment under the Eighth Amendment and prison authorities acted with reasonable diligence to ameliorate these conditions as soon as possible consonant with safety of inmates and staff. Sostre v. McGinnis, 442 F.2d 178 (2nd Cir. 1971), cert. denied, 404 U.S. 1049 (1972), cert. denied, 405 U.S. 978 (1972).

14. Plaintiffs have not shown either a violation of the due process clause of the Fourteenth Amendment or the Eighth Amendment prohibition against cruel and unusual punishment. (See authorities cited in support of Conclusions 1, 2, 3, 5, 7, 8, 9, 10, 11, 12 and 13.)

15. Confinement to cells is not per se an imposition of cruel and unusual punishment. Sostre v. McGinnis, 442 F.2d 178 (2nd Cir. 1971), cert. denied, 404 U.S. 1049 (1972), cert. denied, 405 U.S. 978 (1972).

16. Where, as here, restrictions and limitations are not punitive in nature and are applied to a class as a whole and not to particular individuals, any Eighth Amendment concept concerning relation of penalty to offense is inap-

plicable. Sostre v. McGinnis, 442 F.2d 178 (2nd Cir. 1971), cert. denied, 404 U.S. 1049 (1972), cert. denied, 405 U.S. 978 (1972); Sweet v. South Carolina Department of Corrections, 529 F.2d 854 (4th Cir. 1975).

17. Under the facts of this case any restrictions or limitations were reasonably related to correctional needs. (See authorities cited above.)

It is recommended that the foregoing findings of fact and conclusions of law entered by the Magistrate be adopted and approved by the Court.

DATED: February 2, 1978

OWEN E. WOODRUFF, JR.
United States Magistrate